In the Supreme Court

OF THE

United States

Office - Supreme Court,
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NOV 27 1941
CHARLES ELMORE CROPLEY

OCTOBER TERM, 1941

No. 762

314-700

JAMES M. LEAVER, JR.,

Petitioner,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE (a national banking corporation), and DONALD PARKER, as Administrators with the Will Annexed of the Estate of George D. Parker, Deceased, FOOD MACHINERY CORPORATION (a corporation), SIGNODE STEEL STRAPPING COMPANY (a corporation), PARKER MACHINE WORKS, INC. (a corporation), JOHN D. CRUMMEY and WIRE TIE MACHINERY COMPANY (a corporation),

Respondents.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, James M. Leaver, Jr., respectfully prays that a writ of certiorari issue to review the decision of the Circuit Court of Appeals of the Ninth Circuit rendered in the above cause on July 17, 1941 in which decision, the Court modified a decision of the District Court so as to dismiss the action for want of jurisdiction. A transcript of the record in the case including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The controlling issue involved in the first cause of action is whether the intent and effect of the acts of the respondents constitute a restraint of commerce in violation of the act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. (popularly known as the Sherman Act), as amended by the act of 1914, c. 323, 38 Stat. 731, 16 U. S. C. A. Respondents, Signode Steel Strapping Company will hereinafter be referred to as "Signode"; Donald Parker and Citizens National Bank of Riverside as "Parker's Administrators"; Food Machinery Corporation as "Food Machinery"; Wire Tie Machinery Company as "Wire Tie".

To avoid confusion, the names "Parker Leaver-Evans Wire Binding Machinery Project" and "Parker-Leaver Evans Wire Tie" referred to in the

record as the "Project" have no legal identity. (R. 6.)

The complaint as amended pleads, and the answers, affidavits, admissions and interrogatories support the following facts: The wire binding machine and *unpatented* repair and replacement parts business by the parties to this action is a nation-wide business (R. 27); that Leaver was extensively engaged in that business for more than nine years without interference. (R. 11, 22-24.) Signode and Wire Tie are engaged in the same business on a national scale and control more than 95% of the automatic wire binding machinery business in the whole of the territory in the states comprising the United States of America; 100% in connection with the newspaper trade throughout the whole of the United States and 100% in states and territory lying east of the Rocky Mountains. (R. 249, 250, 743, 748, 1194-1205.)

The automatic wire binding machine business involved in this case was originally developed and carried on by Leaver, George D. Parker and Charles E. Evans, coadventurers in that business under an operating, selling and price-fixing method and agreement for all United States territory (R. 9, 54-72), referred to as the 1922 agreement. Leaver, Parker and Evans jointly invested in the development of that business in excess of a sum of $150,000.00, and Leaver's share in that investment was 40% thereof. (R. 25.) Four types of "Standardized" machines designated "BW", "EW", "HW", and "KW" types were manufactured and sold and a large and profitable business established. (R. 11, 23, 25.)

Leaver, Parker and Evans at all times operated severally and competitively in the sale thereof in the ordinary channels of trade. (R. 11, 60, 66.) Parker acted as trustee and in a fiduciary capacity (R. 12) and carried on manufacture at Riverside, California, in their joint interests and shipped interstate. (R. 11.) They jointly owned and maintained stocks of "Standardized" machines and parts in Washington, New York and Illinois, the territory of Hawaii, and England, for sale through their representatives located in those states and places. (R. 27.) Parker died August 24, 1930. (R. 3.) Leaver, Evans and Parker's heirs, "Owners", continued to carry on the business (R. 70, 71) under the 1922 agreement and two modifying agreements. (R. 74-83, 83-91.) An "Owners Committee" took over, managed and conducted the business for them (R. 15-17), but not in certain interstate territory individually reserved by them. (R. 77, 78.) Leaver, Parker's heirs, Evans (Evans died December 24, 1934 (R. 4)), and Evans' heir, Minnie Amanda Evans, operated severally and independently in that certain interstate commerce territory. (R. 22, 23, 77.) More than 95% of all the sales and shipments made by them were interstate. (R. 27, 77.) Leaver's sales profit over a period of nine years prior to July 14, 1936 did average $5844.94 per year (R. 41) and his manufacturer's profit for a period of five years immediately preceding that date did average $11,057.96 per year. (R. 41.)

Parker Machine Works, Inc., a corporation organized by Parker's heirs, manufactured for and on behalf of Leaver and Evans under orders of the

"Owners Committee" under a written agreement which, upon notice, expired July 14, 1936. (R. 83-91.) Time was requested to complete unfinished business and was granted. (R. 18.) The special manufacturing facilities were in possession of that corporation. (R. 92-139.) Prior to that date of expiration the "Owners Committee" by resolutions, concurred in by Minnie Amanda Evans, established the place of business of the Leaver-Parker-Evans Wire Tie at 5844 Birch Court, Oakland, and authorized Leaver to demand and take over and remain custodian of all records and assets of the "Owners" including those manufacturing facilities, for a period of four years, or until otherwise decreed by order of Court. (R. 837.) Leaver made these demands upon L. O. Campbell, auditor, Parker Machine Works, Inc., and Parker's administrators prior to July 14, 1936. They refused such demands. (R. 20.)

Signode was engaged in selling and/or distributing "Standardized" machines and parts in interstate commerce under a license and extension thereof, which expired July 14, 1936. (R. 769.) Signode again requested an extension of that license, which Leaver refused.

Signode unlawfully leased those machines under contracts containing "tying clauses" requiring the lessee to purchase exclusively from Signode unpatented repair and replacement parts, and common commodity wire supply, used by said machines, at a premium above existing market prices. (R. 7, 784-802.) Food Machinery then desired to make arrangements with Leaver and he refused. (R. 251.)

On July 7, 1936, Signode and Food Machinery Company surreptitiously entered into a written contract (R. 297) which contract provided for organization of Wire Tie (formerly Nailer Machinery Company) for the sole purpose of purchasing with money and assets of Food Machinery Company, the assets of the estate of George D. Parker, deceased, expressly including *non-assignable* and *non-transferable* licenses, rights, interests and agencies. (R. 298-308.) By that contract, dated July 7, 1936 (R. 297), Signode acquired all of the stock of the Parker Machine Works, Inc., which had in its possession said special manufacturing facilities and Signode also acquired control of Nailer Machinery Company, now Wire Tie, through the medium of placing its capital stock in the name of an attorney to be named by Signode. (R. 1254, 1288.) On August 30, 1936, Leaver, Parker's heirs and Minnie Amanda Evans had available for sale to prospective purchasers, in the ordinary channels of interstate trade, at reasonable established market prices, valuable stocks of machines and parts located at Oakland and Riverside, California, in Washington, New York, Illinois and in Hawaii and England. (R. 257-259.) On September 9, 1936, Signode secured under the agreement of July 7, 1936, and by a "Bill of Sale" from Wire Tie, that entire stock. (R. 257-259.) On October 14, 1936, Minnie Amanda Evans, upon the written indemnity guarantee of Signode, entered into a written contract with Parker Machine Works, Inc. (R. 322), the wholly owned subsidiary of Signode. By that agreement, Minnie Amanda Evans contracted to refuse to permit any person other than Parker

Machine Works, Inc., to use the special manufacturing facilities unlawfully withheld by respondents for the purpose of shutting off Leaver's supply, sale and manufacture. (R. 154.)

Since August, 1936, Leaver has been wholly prevented and excluded from doing business in sale, production and distribution of automatic wire binding machines and *unpatented* repair and replacement parts by respondents' acts and has been greatly damaged. (R. 146-157.)

Infringement.

The controlling issue involved in this action is whether the acts of respondents infringe upon Leaver's letters patent and violate the patent laws of the United States. This cause of action was instituted by Leaver under the patent laws against respondents Signode, Wire, Tie, Parker Machine Works, Inc., Parkers' administrators, and John W. Crummey. This action for treble damages and injunctive relief under the patent law pleads:

Respondents since issue of Leaver's several letters patent, September 15, 1936, and prior to filing the complaint, without license and consent of Leaver, but contrary thereto, sold for use and/or licensed for use, certain wire binding machines embodying inventions disclosed and claimed in Leaver's letters patent. Leaver notified respondents to desist from infringement but respondents failed and refused to comply with that request or any part thereof. Defendants conspired together to infringe upon said patent rights (R. 46-50) and continued to infringe said letters

patent. (R. 49.) Leaver has suffered damages by reason of the infringement aforesaid. (R. 44, 49.) The prayer of the complaint is for injunctive relief, damages in the sum of $50,000.00, and that said damages be trebled. (R. 52, 53.)

JURISDICTION AND PROCEDURAL STEPS.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (43 Stat. 938, 28 U. S. C. A. Sec. 347 (a).)

The complaint was filed on September 20, 1938, and was amended on July 14, 1939. Appellees answered the amended complaint and moved with supporting affidavits for a summary judgment in their favor. Appellant filed and served opposing affidavits. The motion was heard and granted, and judgment for appellees was accordingly entered. Appeal to the Circuit Court of Appeals of the Ninth Circuit followed. The Circuit Court of Appeals of its own volition held that the District Court was without jurisdiction, and refused to pass upon any assigned error. In the opinion filed, the Circuit Court of Appeals treats the case as though there were but one cause of action. Petition for rehearing filed in the Circuit Court of Appeals, was denied on the 27th day of August, 1941. The date of the judgment of the Circuit Court of Appeals for the Ninth Circuit herein sought to be reviewed is July 17, 1941.

QUESTIONS PRESENTED.

1. Did not the Circuit Court of Appeals for the Ninth Circuit err in holding that the U. S. District Court is without jurisdiction to inquire into the legality of a conspiracy and acts which have wholly eliminated the party seeking relief from continuing in his established business in interstate commerce, and creating a monopoly in his competitor?

2. Did not the Circuit Court of Appeals for the Ninth Circuit err in holding in effect that the interpretation of a contract incidentally involved in a suit under the anti-trust laws deprives the U. S. District Court of jurisdiction, even where the restraint of interstate commerce is admitted, the damage established and the contract itself is pertinent to show the measure of damages and the illegality of the acts of the conspirators?

3. Did not the Circuit Court of Appeals err in holding that the second cause of action in the complaint for infringement, and in which no violation of a contract is pleaded by petitioner and no relief prayed for thereunder, is an action ex-contractu and not an action in tort under the patent laws of the United States?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The following are the special and important reasons addressed to the sound discretion of this Honorable Court, and relied on for allowance of a writ of certiorari:

(1) The decision of the Circuit Court herein establishes for the first time that a combination in restraint of trade can contract against liability under the anti-trust laws.

(2) The anti-trust decisions of this Court supports the rule that no one can be exempted from the application of the anti-trust laws. There is no justification for dismissal of an action filed under the anti-trust laws because it sets up a contract necessary to establish damages and the erroneous construction by respondents in violation of the anti-trust laws. By making such a distinction the Circuit Court brought the anti-trust laws in hopeless conflict with the law as established by this Court. The anti-trust law should prevail. At a time when a valuable industry is threatened and anti-trust laws violated, the public is entitled to clarity in the law, not conflict, injury and confusion.

(3) The decision of the Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision in the following:

There is no justification for the statement of the Circuit Court herein:

> "We therefore regard as frivolous appellant's characterization of his adversaries' acts as patent infringements and violations of the Anti-Trust Laws."

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of

Appeals for the Ninth Circuit commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in these causes, to the end that the same may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed as both causes of action and that your petitioner be granted such other and further relief as may seem just and proper.

Dated, Washington, D. C.,
November 24, 1941.

Respectfully submitted,
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